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LOS ANGELES, CALIFORNIA

TOKYO, JAPAN

November 4, 1994

BY HAND DELIVERY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: Written Ex Parte Presentation in MM Docket No. 92-266 Regarding 47 C.F.R. § 76.938 and Cable Programming Contracts

Dear Mr. Caton:

Pursuant to the Commission's ex parte rule, 47 C.F.R. § 1.1206(a)(1) please find enclosed two copies of a written ex parte presentation. The written presentation was delivered by hand today to Meredith J. Jones, Merrill Spiegle, Maureen O'Connell, Lisa Smith, Jill Luckett, Richard Welch, Mary McMannis, Blair Levin, William Johnson, Patrick Donovan, and Mary Ellen Burns.

Please direct any questions regarding this filing to the undersigned.

Sincerely,

Carl A. Fornaris*

*Admitted to the Florida and Pennsylvania bars only

Enclosures

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November 4, 1994

BY HAND DELIVERY

Meredith J. Jones, Esq.
Chief, Cable Services Bureau
Federal Communications Commission
2033 M Street, N.W., Room 918C
Washington, D.C. 20554

Re: Written Ex Parte Presentation in MM Docket No. 92-266 Regarding 47 C.F.R. § 76.938 and Cable Programming Contracts

Dear Ms. Jones:

The National Association of Telecommunications Officers and Advisors ("NATOA") is writing to oppose the letters that the law firm of Cole, Raywid & Braverman ("Cole, Raywid") submitted to you on August 8, 1994 and October 28, 1994. Two copies of this letter are being filed with the Secretary of the Commission as required by the Commission's ex parte rule. See 47 C.F.R. § 1.1206(a)(1).

Cole, Raywid's letters sought "clarification" as to whether cable operators can prohibit franchising authorities from reviewing cable programming contracts containing proprietary information when franchising authorities request the production of such contracts for the sole purpose of making a rate determination.

As of this writing, Miller, Canfield, Paddock & Stone ("Miller, Canfield"), on behalf of the City of St. Louis and a coalition of other municipal clients, and Varnum, Riddering, Schmidt & Howlett ("Varnum, Riddering"), which represents over 200 municipal clients, sent letters urging the Commission to reject

Cole, Raywid's August 8, 1994 "clarification" request.[1] NATOA fully supports the positions taken by both law firms in those letters. NATOA writes separately only to stress the importance of the following points: (1) the Commission's rate regulations already permit franchising authorities to require the production of cable programming contracts and, thus, Cole, Raywid's "clarification" request is baseless; (2) Cole, Raywid's allegation that franchising authorities are not competent to maintain the confidentiality of cable programming contracts is incorrect and unsubstantiated; (3) because Cole, Raywid's "clarification" request would effectively carve out an exception to the Commission's broad rule regarding access to proprietary information, if the Commission even considers a modification in this case, it should give interested parties notice and a meaningful opportunity to comment before acting on the request; and (4) the Cole, Raywid proposal to establish a cable operator-supervised procedure for certifying the accuracy of programming costs is flawed. Each of these points will be discussed in turn.

1. The Commission's Regulations Already Permit Franchising Authorities to Require the Production of Cable Programming Contracts

The Commission's May 3, 1993 Report and Order[2] unequivocally gave franchising authorities "the right to collect additional information -- including proprietary information -- to make a rate determination in those cases where cable operators have submitted initial rates or have proposed increases that exceed the Commission's presumptively reasonable level . . . ." Report and Order, 8 FCC Rcd. at 5718, ¶ 130. The Commission

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[1] See Letter from Joseph Van Eaton, Esq., Miller, Canfield, Paddock and Stone, to Meredith J. Jones, Esq., Chief, Cable Servs. Bureau (Oct. 20, 1994); Letter from John W. Pestle, Esq., Varnum, Riddering, Schmidt & Howlett, to Blair Levin, Chief of Staff, FCC (Oct. 27, 1994).

[2] 8 FCC Rcd. 5631 (1993).

codified the access right in 47 C.F.R. § 76.938.[3] Nearly one year later, the Commission -- in its Third Order on Reconsideration[4] -- reaffirmed a franchising authority's broad right of access to proprietary information from cable operators. Third Order on Reconsideration, 9 FCC Rcd. at 4344, ¶ 77. The Commission explained the simple reason for the access right:

> Such access is essential to permit the franchising authority to make an informed evaluation, based on complete information, of the reasonableness of the rate in question. Parties participating in the rate proceeding must have access to proprietary information submitted to the franchising authority in order to evaluate the arguments advanced by the cable operator and to help focus the issues. Without such access, franchising authorities may be frustrated in their attempts to set reasonable rates."

Id. (citing 47 U.S.C. § 543(b)) (emphasis added).

Since cable programming contracts contain information directly germane to determining the reasonableness of programming cost pass-throughs, a franchising authority's request to review that information comports squarely with its access right under 47 C.F.R. § 76.938. Franchising authorities must be able to review that information independently so they can make a complete and informed evaluation of an operator's programming costs. Therefore, because there

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[3] 47 C.F.R § 76.938 provides, in relevant part, that a

> franchising authority may require the production of proprietary information to make a rate determination in those cases where cable operators have submitted initial rates, or have proposed rate increases, pursuant to an FCC Form 393 (and/or FCC Forms 1200/1205) filing or a cost-of-service showing.

[4] 9 FCC Rcd. 4316 (1994).

is nothing to clarify on the issue, the Commission should reject Cole, Raywid's request.

2. Cole, Raywid's Allegation That Franchising Authorities Are Not Competent To Maintain the Confidentiality of Cable Programming Contracts Is Incorrect and Unsubstantiated

Cole, Raywid alleges that franchising authorities will not be able to treat cable programming contracts as confidential where confidentiality is warranted.[5] That allegation is incorrect. As the Miller, Canfield letter notes, there are state and local government laws in place to restrict the public disclosure of confidential information. Franchising authorities have been abiding by such state and local laws in rate proceedings to ensure the confidentiality of proprietary information submitted by cable operators. Cole, Raywid has presented absolutely no evidence that local franchising authorities have been inappropriately disclosing such proprietary information. Moreover, Cole, Raywid has presented no evidence that such state and local laws -- even in states with "open records" requirements -- are insufficient to protect programming contracts that the operator believes contain confidential information.

In the Third Order on Reconsideration, the Commission recognized that state and local governments have access laws to govern the confidentiality of business information and, significantly, found "no justification sufficiently compelling to override" those state and local access laws. 9 FCC Rcd. at 4345, ¶ 79. Cole, Raywid has presented no "compelling" reason why the Commission should revisit its conclusion in the Third Order on Reconsideration and now adopt a federal standard, which would "override" state and local laws,

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[5] Cole, Raywid appears to suggest that all cable programming contracts should be treated as confidential. However, not all cable programming contracts contain a confidentiality agreement between the parties. Moreover, operators already have been submitting cable programming contracts as part of rate proceedings without a request that they be treated as confidential. NATOA urges the Commission not to consider any blanket requirement that cable programming contracts be treated as confidential, and not to consider any other modifications to 47 C.F.R. § 76.938.

to govern access to programming contracts. Because franchising authorities are required to follow their state or local government access laws, franchising authorities can treat specific information -- including cable programming contracts -- confidentially where confidential treatment is warranted.

3. Because Cole, Raywid's Request Would Modify A Commission Rule, the Commission Should Provide Notice and an Opportunity To Comment Before Acting on the Request

Under the guise of a "clarification" request, Cole, Raywid would have the Commission ignore the plain language of 47 C.F.R. § 76.938 and permit cable operators to withhold the information contained in their programming contracts. Permitting cable operators to withhold such information would effectively modify 47 C.F.R. § 76.938.

As the Varnum, Riddering letter points out, the Commission should modify its rules only after it has provided notice and an opportunity to comment.[6] Proper notice and opportunity to comment generally is triggered by the filing of a petition for rulemaking or a petition for reconsideration. Cole, Raywid, of course, has filed neither.[7] Instead, Cole, Raywid sent a letter to the Cable Services Bureau requesting the Bureau to significantly alter the application of the access right vested in franchising authorities to review proprietary information. If the Commission were to consider removing cable programming contracts from the ambit of

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[6] See National Family Planning and Reprod. Health Ass'n v. Sullivan, 979 F.2d 227, 240 (D.C. Cir. 1992) ("notice and comment 'guarantees would not be meaningful if an agency could effectively [and] constructively amend regulations by means of nonobvious readings without giving the affected parties an opportunity either to affect the content of the regulations at issue or at least be aware of the scope of their demands'") (citation omitted).

[7] As the Commission is aware, the time periods for filing petitions for reconsideration of the May 3, 1993 Report and Order and the March 30, 1994 Third Order on Reconsideration -- the orders that adopted and amended 47 C.F.R. § 76.938 -- have passed.

47 C.F.R. § 76.938, it should first provide public notice of the proposed action and afford all interested parties an opportunity to comment.

4. The Cole, Raywid Proposal Is Flawed

The Cole, Raywid letter offers a proposal to the Commission by which operators can self-verify the accuracy of their programming costs. Specifically, Cole, Raywid proposes to allow operators to prove that they have complied with the Commission's rules regarding programming cost pass-throughs by (1) self-certifying their compliance with the rules, or (2) hiring "an independent accounting firm" to certify that the operator has treated programming costs properly. With respect to self-certification, that proposal must be rejected because it removes any independent verification of programming costs from the rate evaluation process. With respect to the proposal that cable operator-selected accountants can step in to verify programming costs, that proposal too must be rejected. The power to review basic service rates lies solely with franchising authorities and the Commission. Further, just because a person works for an accounting firm does not make that person impartial. When a cable operator hires an accountant, the accountant, an agent of the operator, simply becomes an expert retained to testify on the operator's behalf. Finally, the Cole, Raywid proposal that calls for an in camera FCC review of cable programming contracts primarily will not work because it would require the Cable Services Bureau to review hundreds of programming contracts in mini-hearings, thus protracting the already time-consuming rate review process to the detriment of cable subscribers and stretching out the Bureau's limited resources.

In conclusion, NATOA urges the Commission to reject Cole, Raywid's clarification request. Should you have any questions, please contact the undersigned.

Sincerely,

THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS

Norman M. Sinel /CF

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